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# The Struggle over Muslim Personal Law in a Rights-Based Constitution. A South African Case Study

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**Abstract:** The recognition of religious law in a democracy provides a good study of the impact of the constitution on the practice of religion in a multicultural society. This paper discusses the debate over the nature and form of Muslim Personal Law and a rights-based constitution in South Africa. It reviews the debate between competing interpretations within Muslim society. Secondly, it also places the debate in the context of a changing legal culture with respect to the practice of religion within a rights culture.

## Post-apartheid South Africa: Islam and Democracy

The South African constitution is unequivocal about freedom of religion, and the recognition of religious communities in the society. Even though some form of religious freedom was granted to minority religions, daily South African life was characterized by suspicion towards non-Christian religions. Numerous obstacles were placed in their way, and Christian National Education was the philosophy of its educational institutions. The new constitution removed the privileged status of Christianity, and granted equal recognition to all religions. The Bill of Rights in the constitution declared that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion' (Article 15.1) and 'persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their languages' (Article 31.1). Through these provisions the new South African Constitution reversed more than 300 years of the institutional privilege of Christianity.

Since 1994, Muslims have begun to enjoy tangible benefits of this recognition and acceptance. Muslim leaders have been recognised by the state, and often invited to open important state functions like the inauguration of

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state presidents. The relationship between the state and religious leadership has improved steadily. National television has provided proportional time for Muslim programming. When radio transmissions were made available for community radio stations, a number of communities in South Africa applied for, and received licenses to broadcast Islamic programs. Muslim community radio stations in Cape Town, Johannesburg, and Durban, have become extremely popular. Two such stations share a frequency in Cape Town, where Radio 786 ([www.radio786.co.za](http://www.radio786.co.za)) represents the views of Achmat Cassiem, the Islamic Unity Convention, and its supporters, and the Voice of the Cape that of the Moslem Judicial Council. The Voice in Johannesburg represents the Muslim Youth Movement, the most progressive Islamic voice in South African radio ([www.786.co.za](http://www.786.co.za)). In contrast, The Islamic Voice from the outskirts of Johannesburg presented the most traditional face of Islam. In 1998, a small group of Muslims complained that this particular radio station was violating its license agreement for refusing to allow women announcers.<sup>2</sup> Also from the same township, Channel Islam ([www.channelislam.com](http://www.channelislam.com)) broadcasts an Islamic message via satellite to a large part of Africa and Asia. Radio al Ansaar in Durban continues the tradition of guarded modernism and political conservatism of its predecessors in Durban.

The recognition of Islam by the constitution has translated into unexpected outcomes for the Muslim community. While freedom of religion has ensured the place of Islam in open society, freedom of expression, and particularly religious expression, has provided a space for debate and argument among Muslims that could not have been imagined before. In Islamic debate earlier, apartheid was condemned while compromises were made with officials. Moreover, debate about Islam was significantly curtailed in the authoritative structures of religious bodies. But the divergent discourses that were born under the struggle against apartheid were given freedom in democratic South Africa. The radio stations provide a strong indicator of this freedom in a most general sense. One particular site for illustrating and evaluating the fruit of the freedom of expression has been the debate over Muslim Personal Law. It illustrates the implications of this freedom for the ways in which Muslims read the constitution, thought about the state, and extended the limits of how they related to a democratic

2 F. Hafjajee, 'Gender war becomes a radio jihad', in: *Weekly Mail and Guardian* 1998. <<http://web.sn.apc.org/wmail/issues/980116/NEWS10.html>>.

dispensation. The legislative proposals on the recognition of Muslim marriages impacted deeply in the Muslim community, and is worth a substantial reflection.

The most dramatic provision for Islam in the Constitution has been the recognition of Muslim marriages or a complete system of Muslim Personal Law. Paragraph 15 (3) of *Freedom of Religion, Belief and Opinion* includes such a provision:

- (a) This section does not prevent legislation recognising
  - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or [my emphasis]
  - (ii) systems [my emphasis] of personal law and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

In 1994, the government appointed a Muslim Personal Law Board to propose a system of Islamic law as provided by the above-mentioned clause (15(3) (a)(ii)). The body consisted of members from both the religious leadership and representatives from the youth organizations that were active against apartheid. The Board collapsed by April 1995 when its members could not reach agreement.<sup>3</sup> Recognising the importance of the issue, the South African Law Commission appointed a project committee under the chair of Mr Justice M.S. Navsa of the Supreme Court of Appeal. At the end of 2001, after numerous consultations and workshops, this committee produced a proposed bill for recognizing Muslim marriages for public discussion, which appears to be enjoying greater success than the Muslim Personal Law Board. The process leading to this proposed bill provides an opportunity for understanding how Muslims have responded not only to legal reform, but also to religious freedom, freedom of expression and the democratic state.

The Muslim Personal Law Board set about to discuss the system 'of personal law and family law' allowed by the Constitution. The members reached agreement on the desirability of the state's recognition of Islamic

3 E. Moosa, 'Prospects of Muslim law in South Africa: a history and recent developments', in: E. Corran & C. Mallat (Eds) *Yearbook of Islamic and Middle Eastern Law*, Volume 3, Kluwer Law International London 1996, p. 139.

personal law. This agreement was significant because Muslim personal law was a small part of the Islamic moral corpus (Shari'ah). Muslim Personal Law was a product of the nineteenth century, a development that has not been lost on critics who argue that all of Islamic law should be applied. The Muslim Personal Law Board, though, agreed that Muslim Personal Law should be applied to Muslims in South Africa. But the Board split into two camps on the substantive nature of the law. Women's interest groups and progressive Islamic organization insisted that the particular article in question should be read in its entirety. For them, the crux of the matter rested on the fact that the system of Islamic law should be consistent with the 'other provisions of the Constitution'. They believed that the system of Muslim Personal Law in South Africa should be interpreted with this condition in mind. And most importantly, this condition should ensure an interpretation of Islamic law that would not disadvantage women. The leading and most articulate spokesperson for this new interpretation of Muslim Personal Law was Ebrahim Moosa. In both academic and popular articles, he argued that many traditional provisions in the *Shari'ah* should be regarded as *fiqh* (positive law), mainly produced by male scholars whose interpretations need no longer be valid.<sup>4</sup> Making a distinction between a divine and idealized *Shari'ah* and humanly constructed *fiqh*, Moosa argued that the latter could be reconstructed in terms of the constitution. Moosa taught and inspired students and activists to revisit traditional issues in Islamic law. Reflecting this approach, Najma Moosa, a member of the new project committee, concurred: 'Muslim can only give practical legal effect to the Constitution if due recognition is given to a reformed [my emphasis] MPL and its implementation'.<sup>5</sup> With Moosa in the lead, a strong voice emerged for a significant reformulation of Islamic law.

But there were some equally strong objections to this reformism. Some Muslims felt that a parallel legal system for Muslims should be tolerated. Others were offended by the idea that Muslim Personal Law should be subservient to the Bill of Rights. Most Muslims believed that Muslim Per-

sonal Law was simply an undisturbed part of the the *Shar'iah*, divine, and thus not susceptible to change and interpretation, particularly with regard to issues clearly stated in the *Qur'an* and the *sunnah* of the Prophet. The majority of the Board members rejected the new interpretations offered by Moosa and his supporters. In response to the charge that the 'system' would be subject to the Bill of Rights in general, some of the proponents suggested that a system of legal pluralism be adopted by the South African constitution. Toffar, a religious scholar from Cape Town, rejected the secular constitution which made provision for an Islamic juridical system, arguing that 'it is ludicrous to suppose that our family and personal law will function properly according to Shari'ah in the present set-up'.<sup>6</sup> Citing the model of Singapore, he called for a completely separate judicial system for Muslims under a regime that did not impose its secularism on Muslims:

*This is practical, guaranteed, just and fair minority rights in action and avoids the application of the abuse and cruelty of the democracy of numbers – a seemingly inherited phenomenon in virtually all democracies. One may wonder why the aforementioned system [of Singapore] is not considered seriously. Instead, systems of a secular imposed value and administrative system appears to receive apparent favour.*<sup>7</sup>

This appeal to legal pluralism was a popular option as it seemed to indicate that Islamic law would not be forced to adapt and change. For different reasons, Ebrahim Moosa supported such a notion against a uniform, authoritarian legal code, but on one based on civil liberties and the inherent equality between men and women.<sup>8</sup> The idea of a parallel legal system seemed attractive, but it avoided the conflict between human rights and Islamic law that had already been raised in public discourse.<sup>9</sup> Legal pluralism remained an idealized option, but the calls for a new interpretation of Islamic law from a human rights perspective marked the difference between the views of Toffar and Moosa.

4 E. Moosa, 'Muslim conservatism in South Africa', *Journal of Theology for Southern Africa* 1989, 69, p. 73-81; E. Moosa, *Religion and human rights: Taking rights religiously*, Conference presentation. The Contribution of South African Religions to the Coming South Africa. University of Natal, Pietermaritzburg, Natal, 15-17 September 1991; E. Moosa, a.w. 1996.

5 N. Moosa, 'The interim and final constitutions and Muslim Personal Law – implications for South African Muslim women', *Stellenbosch Law Review Regjydskrif*, 1998, 9(2), p. 201.

6 A.K. Toffar, 'The Quranic Constitution and its Expression in Law – A Legal Dilemma in a Non-muslim State', *Occasional Journal of ICOSA*, 1422/2001, 2, p. 18.

7 Toffar, a.w. 2001, p. 19.

8 Moosa, a.w. 1996, p. 150.

9 F. Cachalia and Albie Sachs (foreword by), *The future of muslim family in South Africa*. University of the Witwatersrand: Occasional Paper 12. Johannesburg: Centre for Applied Legal Studies; University of the Witwatersrand Press 1991, p. 48.

Without calling for a separate parallel system of Muslim Personal Law like Toffar, other Muslims have also appealed to the *Limitation of Rights* within the constitution: 'the rights in the Bill of Rights may be limited only in terms of law or general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' (Article 36.1). Those who wanted a system of law directly taken from the books of *fiqh* for the South African legislature argued that the limitation clause should apply to Muslim Personal Law. The interim constitution may have given the impression that customary or religious laws pertaining to personal matters would not be subject to a Bill of Rights. Toffar believed that the absence of a specific clause such as 15.3.b should guide the interpretation of Muslim Personal Law in the interim constitution. He thought that the new constitution placed an unnecessary impediment on the practice of the Muslim Personal Law. This particular model was followed in Zimbabwe where personal laws originating from customary practices were exempt from equality provisions in the rest of the constitution. According to Najma Moosa, such a presumption was plausible in the interim constitution of South Africa.<sup>10</sup> To clear any such presumption in the future, the final South African constitution specified the limits of Muslim Personal Law by introducing the limitation clause under paragraph 15.

While Ebrahim Moosa and others argued that elements of Muslim Personal Law would have to take into consideration the principles of the constitution, and accordingly revised, religious scholars generally resisted such reinterpretation under any circumstances. The Muslim Personal Law Board collapsed in the face of this irreconcilable difference in outlook. The new committee entrusted with formulating a solution faced a difficult task. From the perspective of many progressive organizations, the committee was mainly composed of individuals that supported a more traditional interpretation of Islam. From the point of view of religious leaders, the committee was bound to produce a bill that conformed to the constitution. It seemed that the committee was bound to disappoint both groups. And yet, the committee eventually produced a document that appears consistent with the Constitution, agreeable to at least some members of the religious bodies, and responsive to the concerns of women's groups. The proposed bill, therefore, demands an explanation of how the project committee was

10 Moosa, a.w. 1998, p. 202.

able to arrive as such a compromise between reform and tradition. The approach of the committee seems to indicate a unique stance towards the constitution and the general problem of the non-recognition of Muslim marriages. Beyond the committee, moreover, a history of cases seemed to be accumulating in the law courts of South Africa. I believe that the debates and arguments among judges also had an indirect impact on the deliberations of the committee.

By releasing a piece of proposed legislation entitled 'Islamic Marriages and Related Affairs,' the project committee apparently gave up the attempt to propose 'legislation recognising systems (my emphasis) of personal or family law' (Article 15 (3) (a) (ii)), as the earlier Muslim Personal Law Board had done. Such an approach had opened up ideological differences that could not easily be settled. They were reflections of global Islamic debates, for which there were not immediate resolutions on the horizon. Instead, the committee opted to develop the first provision for 'legislation recognising marriages concluded under any tradition' (Article 15 (3) (a) (i)). There is a subtle difference between the two and the Constitution has an important disjunction (or) between the two clauses. The earlier attempt of the Muslim Personal Law Board was bogged down in the development of a comprehensive system of personal law. According to Najma Moosa, also a member of the committee, nothing short of a complete code would have been desirable: 'MPL should be codified into a separate code of law which would form part of the statutory law of the South African legal system' and the best solution lay 'in codifying Islamic law and enacting a comprehensive bill or "uniform Muslim code"'.<sup>11</sup> This approach seemed to have been avoided. The new committee seemed to directly address the critical problem of the non-recognition of Muslim marriages in South Africa, a source of great many social problems. Muslim marriages conducted by Imams in the mosques were not recognized until the promulgation of the Constitution. Even in the new dispensation, effective court decisions were hamstrung in the absence of legislation. In the apartheid days, Muslim marriages were considered 'potentially polygamous' and hence repugnant to the Western norms adopted by South African courts.<sup>12</sup> By choosing to abandon or side-step the ideological debate in favor of the actual needs of the society, the proposed bill suggested a unique approach. The approach of the committee confirmed an important democratic principle of working

11 Moosa, a.w. 1998, p. 201 n. 36.

12 Moosa, a.w. 1996.

from concerns and issues that directly affected people. The ideological and theological debates tended to obscure the issues of recognition that the Constitution sought to address in the first place. By directly addressing the source of the grievances in South Africa at grassroots level, the project committee made a significant breakthrough in this matter.

A few examples from the proposed legislation illustrate the interface between human rights and social mores. One of the significant issues impacting on customary marriages concerns the appropriate marriageable age, particularly for young girls, and this is true of Islamic marriages as well. The legislation proposed consent on the part of both spouses as well as an eighteen year age limit. However, in view of the fact that traditional understandings of Islamic law did not specifically prohibit marriage under the stipulated age, the proposed legislation allowed the possibility of appealing to the Minister of Justice for marrying at a lower age. It even went further by making it possible for marriages conducted between minors to be declared valid after the fact. The guiding principle seemed to be a reasonable age (18) but with sufficient possibilities of allowing minors to marry under certain conditions. And most importantly, the implication of marriage between minors would immediately follow. Such marriages would not be declared invalid, for fear that the consequences would militate against the weaker party (girls or women). A similar reasoning seems to be at work in the case of registering marriages. Again, it is not absolutely essential according to traditional perceptions about Islamic law to register a marriage in a court of law. The proposed act insisted that all marriages should be registered, but allowed for the possibility of recognizing all Muslim marriages whether they are registered or not.

A very difficult issue arose in the early debate within the Muslim community concerning the issue of polygyny. The proposed legislation did not completely outlaw polygyny, but insisted that permission for a husband to marry again could only be given by the legal system. Such permission will be granted on condition that the following three conditions were met:

1. the husband has sufficient financial means;
2. there is no reason to believe, if permission is granted, that the husband shall not act equitably towards his spouses;
3. there will be no prejudice to existing spouses.

Each of these conditions were implied in Qur'anic verses pertaining to this issue. Moreover, they are the kind of conditions that Muslims in South Africa would expect to be fulfilled before a polygynous marriage was an

accepted social norm. Such conditions were rarely measured with any kind of scrutiny, which the proposed legislation was bringing into effect. The proposed legislation also added a further feature by insisting that in the event of a second marriage within an existing marriage, the financial implication of an additional spouse should immediately be assessed on the existing marriage. Failure to obtain permission for a second marriage was subject to a R50 000 fine.

The project committee's approach indicated a breakthrough in the broader debate on Islam and democracy. The earlier Muslim Personal Law Board did not simply break down on conflicting readings of the constitution. Differing readings of the constitution were signs of some deeper misgivings relating to the place of Muslims and Islam in a secular democracy. This tendency was most evident in the approach of Toffar. While Muslims were enjoying the fruits of an open society and taking advantage thereof, they were also exposed to a wide variety of modern interpretations of Islam that regarded democracy as anathema to Islam. The dominant tendency in that discourse rejected democracy as a man-made system that potentially or actually violated the terms of the *Shari'ah*, presumably a divine system of laws that simply had to be implemented. These ideological challenges seemed intractable, as powerful groups on the street of Cape Town and in other media openly advocated a rejection of democracy and the South African constitution, in the name of Islam. With Muslims constituting less than two percent of the population, the talk of an Islamic state seemed totally inappropriate. But in a global world where Islamic ideas were shared, such notions received a fair share of support among sectors of the Muslim community in South Africa.<sup>13</sup>

But the committee's recommendations of a bill recognizing Muslim marriages must also be placed into a changing legal context. As Muslims themselves were arguing about the nature of Muslim Personal Law, a number of significant cases were brought to the courts. The judgments and opinions expressed at these hearings provide a necessary perspective of an emerging constitutional framework for freedom of religion with respect to Islam in particular and religions in general. The approach to Muslim Personal Law should not be dissociated from the approach to different relig-

13 F. Esack, 'Three Islamic strands in the South Africa struggle for justice', *Third World Quarterly*, 10, 2, April, 1988, p. 473-98; A.I. Tayob, *Islam in South Africa: Mosques, Imams and Sermons*, University of South Florida Press, Gainesville 1999.

ions. As far as I know, the debates within Muslim circles have drawn attention to the discussion on Customary laws in so far as these also touch upon family legal matters. But the connection between Islam and other religious issues have been part of the court records as well. And the solutions offered by the judges have elaborated a coherent framework on the basis of a comparative framework around the basic principles of freedom of religion on both individual and communal bases.

The key issue in courts revolved around the social values of the pluralistic society of South Africa. As mentioned already, Muslim marriages were regarded by the court as inimical to the *boni mores* (good values) of the society because they were always potentially polygamous even when they were de facto monogamous. With the coming into effect of the first democratic constitution in its interim and its final form on 27 April 1994 and 4 February 1997 respectively, the courts began to take a different approach.<sup>14</sup> In September 1994, one judgment in fact still hinted that that new values would still not accept polygamous, or potentially polygamous marriages: '... the principle of gender equality ... may well lead to the conclusion that polygamous (and potentially polygamous) marriages are as unacceptable to the mores of the new South Africa as they were to the old'.<sup>15</sup> But the cautionary comment was expressed on the main judgment which ruled against the plaintiff because the decision under review took place on 14 January 1994 and the application was brought on 10 February 1994. The new constitution only became effective 27 April 1994. In the next few years, though, the courts took a very different view of the matter. It can be said that, in fact, potentially polygamous marriages were regarded as valid under the new constitution.

In many of the cases that then appeared at the courts, the issue of entanglement with religious doctrine was always considered. In a secular constitution, most judges were hesitant to take up cases directly or indirectly impacting on religion for fear of becoming embroiled into doctrinal issues. I have used the word 'most' because one judge ventured into a doctrinal issue in a case brought by Christian Education South Africa

against the Minister of Education. According to the constitutional court Judge Sachs,

*While not doubting the sincerity of the appellant's beliefs, Liebenberg J in the High Court found that the scriptures relied on provided 'guidelines' to parents on the use of the rod, but did not sanction the delegation of that authority to teachers. He held that the authority to delegate to teachers was derived from the common law and the approach adopted by the appellant was merely 'to clothe rules of the common law in religious attire'.<sup>16</sup>*

Judge Sachs avoided direct debate but still pointed to the difficulty of separating the purely religious from the secular. The careful sifting of religious issues that the court was expected to deal with were elaborated and defined in a number of other interesting cases. In 1996, the Cape of Good Hope Provincial Division was confronted with the difficult task of have to separate religious from social issues in an issue involving Islamic marriage. Beginning with a common conception in contemporary Islamic writings, Judge Farlam feared an intractable doctrinal entanglement because of the 'continuity of Muslim law, religion, culture and identity'. He proceeded to a very interesting judgment after he was persuaded by expert witnesses on both sides that 'in this case do not – despite the fact that there is a continuity of Muslim law, religion, culture and identity and no clear barrier between the religious and secular spheres – require any religious doctrine to be interpreted'.<sup>17</sup> In 2001, the Cape of Good Hope Provincial Division was confronted with a mosque dispute where the existing Imam was opposed by a faction in the small town of Worcester. In 2002, the Constitutional Court finally gave judgment on the constitutionality of Rastafarians using marijuana as a religious right.<sup>18</sup>

In each of these cases, it appears that courts were prepared, and actually forced, to enter into religious debates that had some effect on social life that impacted upon rights. The effects of religious practices, in essence, became the single most important principle with which the courts worked. I would like to discuss two particular cases, in 1996 and 1999 respectively,

- 16 'Christian Education South Africa Versus Minister of Education', Constitutional Court of South Africa, 2000.
- 17 'Ryland v Edross 1997 (2) SA 690 (C)', in *Chronological Listing of Cases Jan 1957-Dec 2001*, 2, 558; Cape of Good Hope Provincial Division, 1997.
- 18 'Prince v President, Cape Law Society, and Others', in SA, 2, 794; Constitutional Court, 2002.

14 <http://www.info.gov.za/constitution/1993/1993cons.htm>.

<http://www.info.gov.za/structure/constitution.htm>.

15 'Kalla and Another V the Master and Others', in *South African Law Reports (SA)*, 1995 (1) SA, 261; Transvaal Provincial Division, 1994, p. 270.

that had a direct impact on how the courts were justifying entanglement and how their decision were taking up Muslim debates as well. I have already mentioned the Rylands v. Edross (1996) where Judge Farlam dealt with the wide-ranging definition of Islam. It was also this case that set aside the general doctrine that Muslim marriages were potentially polygamous. Judge Farlam argued that the new constitution had clearly set up different principles for the social values of the new South African society:

*Can it be said, since the coming into operation of the new Constitution, that a contract concluded by parties which arises from a marriage relationship entered into by them in accordance with the rites of their religion and which in fact is monogamous is 'contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society' or is 'fundamentally opposed to our principles and institutions'? I think not.<sup>19</sup>*

The judgment revealed the impact of the new constitution, then still an interim constitution, on the recognition of Islamic mores in South African society. The case involved a woman who demanded a fair share in the conjugal estate at the time of divorce. It involved a Muslim marriage conducted only according to Islamic rites. The judge appealed to the interim constitution in turning against a long standing legal tradition that considered Muslim marriages potentially polygamous and thus against the social norms of society. Since the constitution recognized the pluralist nature of South African society, the judge felt comfortable in extending legal recognition to Muslim marriages.

But Judge Farlam then had to consider the next issue of how to interpret the particular ruling of Islamic law with regard to property acquired during an Islamic marriage. And this is where he treaded directly into the legal disputes that were going on within the Muslim community. The contentious issue raised in the case was if the wife was entitled to an equitable share of the property accumulated by the husband during the divorce. Two competing interpretations were presented to him. The first, led by Ebrahim Moosa on behalf of the plaintiff, argued that a Malaysian precedent had been established that property acquired during marriage should be equitably shared. The Malaysian case was based on a synthesis of Islamic law and custom (*adat*). Such co-existence of Islamic law and custom was not

19 'Ryland v Edross 1997 (2) SA 690 (C),' 571.

unusual in Muslim societies, but only in Malaysia was such a synthesis legally recognized. Moosa argued that such an approach ought to be followed in South Africa in terms of the constitution. On the other hand, Alie Moosagie, the expert witness on behalf of the defendant (husband), presented the opposing viewpoint that such a condition of matrimonial property was not implied in Islamic law. He argued that Islamic law should be applied irrespective of any contextual application and interpretation. He did not present a counter-argument, though, to the contextual application espoused by Moosa. But the judge picked up this nuance and insisted on a relevant South African custom. Since the Malaysian case depended on a particular customary practice, the judge insisted on finding a similar practice in the Western Cape. In the absence of such a custom, conceded by both Moosa and Moosagie, the application was turned down:

*In view of the fact that no other Islamic country, on Dr Moosa's own evidence, adopts this approach, I cannot see on what basis I can regard the Malaysian rules as being part of the provisions of Islamic personal law incorporated by the parties into their contract unless a custom similar to the Malay adat relating to harta sepencarian prevails among the Islamic community, to which the parties belong, in the Western Cape.*

From the judge's point of view, the recognition of Islamic law in South African courts would have to reflect the norms and values of the South African Muslim community. The learned judge was not prepared to simply reinterpret Islamic law in terms of the Bill of Rights. The recognition of Islamic law in the constitution bound the judges to the norms and practices of South African society. Since the case opened the debate to a contextual interpretation, the existing context of South Africa had to be reflected in any novel interpretation. In the absence of actual legislation, a reformed approach to Islamic law did not stand much chance of success. The judgment was a landmark case in that it extended a constitutional recognition to Muslim marriages as such. However, it also indicated that innovative interpretations were also bound to face the norms of South African society. This is a crucial point which proved very important in the proposed legislation.

But the next case produced another test case for the development of Muslim jurisprudence in South African courts. This case also involved a marriage conducted in accordance with an Islamic rite. In this case, the couple were involved in a motor vehicle accident in which the husband



died. The Multilateral Motor Vehicle Accidents Fund challenged the surviving spouse's right to the insurance payment on the basis that the marriage was not valid according to the law. The case went all the way to the Supreme Court of Appeal where Judge Ismail J. Mohamed issued a celebrated verdict. He drew on the *Ryland v Edross* case, but also clarified the particular disentanglement in terms of common law:

*In my view the correct approach is not to ask whether the customary marriage was lawful as common law or not but to enquire whether or not the deceased was under a legal duty to support the appellant during the subsistence of the marriage and if so whether the right of the widow was in the circumstances a right which deserved protection for the purposes of the dependent's action.*<sup>20</sup>

In this way, he opened the door for the development of common law, not to recognize Muslim marriages, but to judge the effects of such actions. He even went so far as to open the door for the courts to evaluate the effects of polygamous unions:

*I do not thereby wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependents would necessarily fail in a dependant's action based on any duty which the deceased might have towards such dependants.*

And finally, Judge Mohamed left open the possibility or desirability of separate legislature recognizing Muslim marriages:

*I have no doubt that it would be perfectly proper for the legislature to enact such legislation if it considered it necessary, but it does not follow that the courts should not interpret and develop the common law to accommodate this need if it was consistent with the relevant common-law principles which regulate the objectives and proper ambit of the dependant's action in Roman-Dutch law.*

It seems, then, that the courts have produced two possibilities. In the first case, represented by Judge Mohamed, the courts should apply common law fairly and creatively and not discriminate against plaintiffs and defendants that seek redress from the courts. The Christian bias of the previous judgments has been exposed quite convincingly. On the other hand,

20 'Amod (Bom Peer) and Another V Multilateral Motor Vehicle Accidents Fund', in *All Southern African Law Reports*, 4, 421; Supreme Court of Appeal, 1999, 427/19.

the debates within South African Muslim society were also radiating within the corridors of the judicial system. Farlam's opinion indicates that the general opinion of the Muslim community will favour a more conservative approach in the judgment. The legislation tabled for parliament seemed to take into consideration the issue of recognition. It has, in deed, followed where the courts have led it. On the other hand, the workability of its limits with respect to marriage of minors, arbitrary divorce and polygyny still have to be seen. With a vigorous civil society sector that highlights the ill effects of these practices in society, judges may yet lead the legislature in more creative solutions.

### Conclusion

This paper has argued that the debate over the Muslim Personal Law has shifted from an ideological conflict to a case-based approach to problems encountered within Muslim society. The recognition of Muslim Personal Law in the new constitution had galvanised different sectors to have their understanding and interpretation codified in legislation. This led to irreconcilable conflicts within Muslim society. Some sections of Muslim society remain opposed to any form of legislation that attempted to reconcile an understanding of Muslim Personal Law and the constitution. This may be the cause for continuing delay in the enactment of law. After the initial conflict between progressive and conservative voices, however, the process took another direction when the focus shifted to problems of recognition. This process adopted a more piece-meal approach to the relations within the Muslim society, and to the limits imposed by the constitution. Without any compromise to either Muslim Personal Law or the constitution, the proposed bill steers a course between the practice of Muslim Personal Law as religion and the effects thereof in terms of the constitution. This particular approach, the paper argues, runs parallel to a history of the cases brought to South African courts with regard to the practice of religions. In a number of landmark cases, the courts have charted a course in the recognition of religious practices on the one hand, and their possible effects on the other. Muslim marriages can be placed in a similar framework. On the one hand, the particular practice of Islam was respected, but its effects were subject to the scrutiny of the courts. So far, the cases appearing in the South African courts have dealt with the problem of the misrecognition of Muslim marriages. In the future, we may possibly get more cases where the effects of practices within Muslim marriages will come for scrutiny as minors, women and other negatively affected parties

bringing their grievances to court. Meanwhile, the proposed legislation still hovers over the differences within Muslim society. But the future course of events has been set.

## Who is a child? Consideration of tradition and modernity in Iranian child law

Dr. Nadjma Yassari, LL.M.<sup>1</sup>

### 1. Introduction

As the Islamic Republic of Iran is going into its 25 year of existence, the years of Ström and Stress are giving way to an era of critical questioning and growing scepticism about the system and the leaders; a society is showing itself that is increasingly putting questions marks and demanding responses and accountability for the deeds of the government. This movement is often linked to president Khatami's access to power, however his actual impact has been so far limited. Women and the youth have become important figures on the political scene, able to decide the outcome of elections and being increasingly considered a determining power. This counts true for politics but also for legal reforms. Iranians question all the limitation put upon women as potentially being unislamic and use the flexibility of Islamic regulations to challenge the conservative views of the male clerical establishment. Today Iran is struggling between a claim to morality and compatibility with Islamic principles and the needs of modern society. With social realities changing the ideal prescribed by religious law is being challenged. In other words, while the legal system has its roots in a period of traditionalism, the economic, social and cultural attributes of Iranians have undergone and are undergoing a process of transformation. As a result, the voices for reforms have become louder and these demands have been formulated in law.

### 2. Sources of law

When family law was codified in 1935, the new Iranian Civil Code (hereafter CC) borrowed its rules from the Shr'i rules on family and succession. The Iranian family law rules are thus a reflection of the Islamic concept of family, a concept that is based on the idea of the distribution of specific roles to the parties in a family relation. It is based on the per-

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